United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

74-1537

United States Court of Appeals
FOR THE SECOND CIRCUIT

B

RENEE SLADE,
Plaintiff-Appellee,
against
SHEARSON, HAMMILL & CO., INC.,
Defendant and Third-Party Plaintiff-Appellant,
against
NATIONAL BANK OF NORTH AMERICA,
Third-Party Defendant.

EDWARD E. ODETTE,
Plaintiff-Appellee,
against
SHEARSON, HAMMILL & CO., INC.,
Defendant and Third-Party Plaintiff-Appellant,
against
NATIONAL BANK OF NORTH AMERICA,
Third-Party Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PAINE, WEBBER, JACKSON & CURTIS INCORPORATED AS *AMICUS CURIAE*

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PRELIMINARY STATEMENT

Paine, Webber, Jackson & Curtis Incorporated ("Paine, Webber") submits this brief *amicus curiae* to assist the Court in responding to the question certified on this interlocutory appeal:

> Is an investment banker/securities broker who receives adverse material non-public information about an invest-

> ment banking client precluded from soliciting customers for that client's securities on the basis of public information which (because of its possession of inside information) it knows to be false or misleading?

The certified question points up the difficult problem of reconciling two basic objectives of federal securities regulation: first, promoting fairness and equality among investors by prohibiting any use of non-public information in connection with the purchase or sale of securities; and, second, promoting high standards of conduct among broker-dealers in connection with their recommendations to customers.

These competing interests should be properly balanced in this Court's response to the certified question. Such a balance has not been struck by the proposals of Salomon Brothers ("Salomon") and the Securities and Exchange Commission ("Commission") in their *amicus* briefs. Indeed, the position urged by Salomon is designed mainly for the aid and benefit of Salomon whose business is unique and markedly different from that of Paine, Webber and most other investment bankers/securities brokers. The "distant early warning" system suggested by the Commission in its *amicus* brief is a simplistic solution to complex problems which, like the Salomon proposal, would require a substantial restructuring of the securities and investment banking industries—a result which the Commission specifically states should be avoided.

The "Chinese wall" is a response to the prohibitions against the use of inside information. It is designed to prevent the use of that information by establishing barriers to the information flow between components of a diversified financial organization. Defendant-appellant clearly would have violated the federal securities laws if it did not have a "Chinese wall" and made recommendations to customers on the basis of inside information gathered by its investment banking department. Under the lower court's decision, however, defendant-appellant could be found to

have also violated the law even though it maintained a fully adequate "Chinese wall" because it failed to use the inside information to prevent a recommendation to customers.

If the certified question is answered in the affirmative, this Court would be either substantially modifying the insider trading doctrine or causing a substantial structural modification of not only the securities industry, but also the banking industry and other components of the financial community. In either event, the interests of investors would not be furthered. Given these alternatives, Paine, Webber strongly believes that investors and the underlying objectives of the federal securities laws would best be served by answering the certified question in the negative.

Of course, the broad implications raised by the certified question can be readily avoided if this Court were to answer that question on the basis of the allegations of plaintiff-appellee "that the insulating wall which Shearson claims it erected between its two departments was full of cracks through which the investment banking department did, indeed, filter a considerable amount of propaganda conveying a euphoric view of Tidal" while "adverse facts . . . were sedulously kept by the investment banking department from the eyes and ears of Shearson's salesmen." (Plaintiffs' Br. at 4-5). If these allegations are true, defendant-appellant did not maintain a "Chinese wall" and therefore the question need not be reached as to whether a properly maintained "Chinese wall" insulates a broker-dealer from the liability imposed by the District Court.

The briefs of the parties to the appeal, as well as those participating *amicus curiae*, have exhaustively analyzed the judicial decisions and the legal literature that touch upon the issues here. Paine, Webber concurs in the analysis presented by defendant-appellant and will confine itself here to the implications to the securities industry of the issues raised on appeal.

PAINE, WEBBER IS A REPRESENTATIVE INVESTMENT BANKER/SECURITIES BROKER

Paine, Webber, founded in 1879, is a member firm of the New York Stock Exchange and one of the largest investment banking and securities brokerage firms in the United States . It has a network of more than 100 offices across the United States and foreign offices in London, Paris Geneva, Lugano and Tokyo. The firm employs about 1,900 registered representatives in day-to-day personal contact with more than 200,000 active investor accounts, both individual and institutional. The registered representatives are supported by a large research department comprised of professional analysts who investigate and evaluate the investment merit of selected securities bought, sold and held by customers.

Paine, Webber does not participate in this case to affect or influence pending litigation to which it is a party. It participates because of the important implications of this case to the securities industry.

The interests of the securities industry and of the investors served by that industry are not, in Paine, Webber's view, adequately represented by Salomon. Salomon's operations are relatively unique to the securities industry. Unlike Paine, Webber and many other brokerage firms, it does not market securities primarily on the basis of investment research and evaluation. Accordingly, it proposes to resolve the issues before this Court in a manner compatible only with Salomon's peculiar type of operations.

Paine, Webber, like *amicus* Salomon, maintains a "restricted list" to ensure compliance with regulatory restrictions on trading in certain securities. Paine, Webber does not agree with Salomon, however, that a restricted list can effectively deal with problems of inside information. In Paine, Webber's view, it is naive to suggest that placing a security on a restricted list, without explanation, would not be construed as a signal of the existence

of inside information to customers of the securities firm. Nor is it possible, as the Commission suggests, to place securities on a restricted list where there is a mere possibility of encountering inside information. Such possibilities are limitless, and there is no realistic way to identify them in advance.

ARGUMENT

I

Salomon Brothers' Position is Not Representative of the Securities Industry and is Not Consistent with the Protection of Investors.

Salomon argues as *amicus* that this Court should affirm the decision of the District Court and answer the certified question in the affirmative. According to Salomon's brief, a customer should have recourse against a securities firm if that firm's broker-dealer department *recommends* the purchase of a security based upon public information which the firm's investment banking department knows, solely on the basis of non-public information, to be false and misleading. (Salomon Br. at 6-9). Salomon contends, however, that where the broker-dealer department refrains from making recommendations, possession of adverse inside information by the investment banking department should not prohibit the broker-dealer department from *soliciting* a customer to buy a particular security or from executing transactions for that customer. (Salomon Br. at 1, 9-14).

In its brief Salomon takes issue with the District Court's use of the word "soliciting," rather than "recommending," in the certified question. (Salomon Br., footnote, at 1). By drawing the distinction in a footnote, rather than textually, and by characterizing the District Court's use of the word "soliciting" as only "unintended" (*id.*), Salomon might have this Court believe that it is engaged in little more than a semantic quibble.

The fact of the matter is that the distinction between "soliciting" and "recommending" is critical to Salomon's way of doing business and, therefore, critical to Salomon's entire position. If this Court should answer the certified question in the affirmative but limit the scope of its decision to "recommendations," and not "solicitations," Salomon will have succeeded in gaining a distinct and entirely unjustified competitive advantage over most other major securities firms. These firms, like Paine, Webber and unlike Salomon, market securities primarily based upon research through recommendations to customers.

A. *Salomon Brothers' Business Involves Soliciting Customers to Purchase Securities Held in its Inventory.*

Salomon states at pages 4-5 of its brief that it has developed procedures which "precisely guard" against a situation such as that presented by the case at bar, namely, the erection of a "Chinese wall" between its investment banking and broker-dealer departments, together with "a policy of not recommending securities about which it is likely to obtain material inside information through an investment banking or similar relationship." Salomon then suggests that other securities firms could achieve the same degree of purity in their operations if they would adopt the same policy. (Salomon Br. at 19).

Salomon creates the clear inference that its operations are representative of other multi-service securities firms. (Salomon Br. at 2). The plain fact is, however, that Salomon is almost unique among securities firms. Unlike Paine, Webber and most other multi-service securities firms, Salomon deals almost exclusively with financial institutions—banks, insurance companies, investment advisers, mutual funds—and with corporations, federal agencies and state and local governments. Salomon vigorously competes for institutional business with Paine, Webber and many other investment bankers/securities brokers. It does not do so, however, primarily by offering institutional customers

investment recommendations based upon in-depth research as do many other investment bankers/securities brokers who compete for the same customers. Instead, Salomon competes for institutional business by aggressively soliciting customers to purchase large blocks of securities from its own inventory and the holdings of its brokerage customers.

In short, Salomon can vigorously support the District Court's decision because it is not significantly engaged in the business of recommending securities to its customers. If that decision, and the certified question, is strictly limited to "recommendations," then an affirmance by this Court would have little or no adverse effect on Salomon's operations. Salomon can then blithely suggest, as it does, that a securities firm whose business primarily involves making recommendations to individual and institutional customers "should have a policy of not recommending securities about which it is likely to obtain material inside information through an investment banking or similar relationship." (Salomon Br. at 19).

Salomon's brief is quick to point out, however, that such policy should not extend to "soliciting" customers. This is readily explained by the fact that Salomon's business consists, in part, of "soliciting" institutional customers to purchase large blocks of securities from Salomon's inventory of securities.* In such transactions, of course, Salomon is acting as a principal for its own account and not simply as a broker for others. Its customers buy securities from Salomon as the owner and seller of such securities and not merely as an intermediary. Accordingly, Salomon has a far stronger and more direct interest in effecting a sale from its own inventory than would be the

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*Mr. William R. Salomon, Managing Partner of Salomon Brothers, testified before the Securities and Exchange Commission on November 1, 1971, in connection with its hearings on the Structure, Operation and Regulation of the Securities Markets (File No. 4-147), that in fiscal year 1970, Salomon maintained an average daily inventory in securities valued at $2.2 billion.

case if it were merely earning a commission as a broker for a third party.

In its brief, Salomon suggests that "solicitation" is far removed from the affirmative act of "recommending" a security for purchase. (Salomon Br., footnote, at 1). That is decidedly not the case. As defendant-appellant correctly points out in its reply brief (at 14), Salomon's trades "are scarcely as mechanical as Salomon represents them to be." In selling securities from its inventory, Salomon does not simply sit back and wait dispassionately for customers to place unsolicited orders, or mechanically execute orders for customers who dial its telephone number. It affirmatively and aggressively seeks out its customers, hoping to induce them to buy a particular security at a particular time and at a quoted price.

Salomon may not be "recommending" that its customer buy stock A instead of stock B. But in aggressively "soliciting" the customer's business, Salomon is certainly recommending, implicitly if not explicitly, that the customer buy stock A or stock B, in some cases from Salomon's inventory, today rather than next week or not at all, and rather than buying stock C or stock D from one of Salomon's competitors.

B. *There is No Legitimate Basis for Distinguishing Between "Recommending" a Security to a Customer and "Soliciting" a Customer to Buy a Security.*

There is no legitimate basis, either in law or in policy, for placing form above substance by excising the word "soliciting" from the certified question and replacing it with the word "recommending." To do so would contravene the repeated holdings of the courts that the anti-fraud provisions of the federal securities laws do not sanction the kind of distinction between active and (allegedly) passive misrepresentation that is inherent in Salomon's "recommendation"/"solicitation" distinction. *Affiliated Ute Citizens* v. *United States*, 406 U. S. 138 (1972); *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U. S. 180 (1963);

Hughes v. *SEC*, 174 F. 2d 969 (D. C. Cir. 1949); *Charles Hughes & Co.* v. *SEC*, 139 F. 2d 434 (2d Cir. 1943), *cert. denied*, 321 U. S. 786 (1944); *Shapiro* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 353 F. Supp. 264, 278 (S. D. N. Y. 1972), *aff'd*, 495 F. 2d 228 (2d Cir. 1974).

Thus, in *Affiliated Ute, supra*, the Supreme Court ruled that there was no basis under Rule 10b-5 for distinguishing between affirmative misrepresentations of material facts and failure to disclose material facts that reasonably could be expected to influence an investment decision. The Court specifically rejected the individual defendants' pleas that they were merely engaged in the ministerial function of executing stock transactions, stating that defendants "in a distinct sense were market makers." 406 U. S. at 153. As such, the Court held, it made no difference for purposes of Rule 10b-5 that "these defendants may have made no positive representation *or recommendations*." *Id.* (emphasis added). They could not "stand mute" while facilitating sales in a market which they "had developed and encouraged and with which they were fully familiar." *Id.*

Similarly, there can be no rational basis for the distinction put forth by Salomon. It would hold a securities firm liable for money damages if its broker-dealer department "recommended" the purchase of a particular security based on public information which was contradicted by non-public information in the possession of its investment banking department. It would exonerate the firm, however, if its broker-dealer department "solicited" the purchase of a particular security from inventory at a price which the non-public information in its investment banking department would demonstrate to be grossly inflated. From the customer's perspective it can make absolutely no difference whether he was actively or passively misled. In either case, he was induced by public information to make a decision which he presumably would not have made if the non-public information had been made available to him.

II

The Commission's Position, Misleading in its Simplicity, Would Have Drastic and Far Reaching Consequences for the Securities Industry.

The Commission confidently asserts in its *amicus* brief that the certified question can be answered affirmatively "without requiring far-reaching changes in the securities industry" (Commission Br. at 4), a conclusion which the District Court itself was not prepared to reach. According to the Commission, recommendations based on public information that may be inconsistent with inside information can easily b. avoided. The Commission would achieve that result by simply requiring all securities firms to adopt a policy of not recommending the securities of *any* underwriting client, or *any* other security where some "financing involvement is likely to result in the receipt of inside information." (Commission Br. at 12). This result would be achieved simply by placing all such securities on a so-called "restricted list."

The restrictions suggested by the Commission would not be limited to the instant situation where the firm's investment banking department is alleged to have *actually had* inside information inconsistent with the public information on which the broker-dealer department based its recommendation. Rather, the Commission would prohibit recommendations with respect to any security as to which the firm *may* be in a position to receive inside information; that is, as the Commission states, "before such information has actually been received" (Commission Br. at 12) and despite the fact that such information may never be received.

The Commission's recommended solution is a model of simplicity, and if enforced, would undeniably eliminate the specific, narrow problem which the case at bar presents. Paine, Webber respectfully suggests, however, that the Commission's solution

would do much more. It is a Draconian solution which, contrary to the Commission's protestations, would ". . . drastically [and] unnecessarily impair the functioning of the securities industry [and] of our financial institutions and markets generally." (Commission Br. at 4-5).

A. *The Commission's Proposal Ignores the Critically Important Research Function*

The Commission asserts that a securities firm should "never recommend the securities of an investment banking client." (Commission Br. at 11). The Commission apparently believes that such a proscription is necessary because "the firm may have material inside information" with respect to those securities. (*Id.*). A securities firm, however, *may* encounter inside information regarding many securities and not just securities of investment banking clients. For example, the potential exists for uncovering inside information whenever a securities firm conducts in-depth research into a security for purposes of recommending it to customers. If a firm is prohibited from recommending a security not because it actually acquired inside information but because it *may* acquire such information, it would have little reason to continue its research efforts.

Such a result is precisely contrary to what the Commission has heretofore considered to be in "the best interests of investors." Only recently the Commission noted a need to adopt policies "designed to preserve and strengthen . . . . [t]he professional investment research capabilities which have been developed to guide investors' capital on an informed basis and in the light of potential risk and reward." Securities and Exchange Commission, *Statement on the Future Structure of the Securities Market* [Special Studies Transfer Binder] CCH Fed. Sec. L. Rep. ¶74,811 (1972). However, if the Commission's proposal were followed, investment research capabilities would perforce be weakened, since securities firms would find it pointless to do

research which they could not use to make recommendations. That would be the inevitable consequence of adopting the Commission's position that recommendations must be avoided whenever there is a possibility that inside information *may* possibly be encountered.

It might be suggested that the Commission did not intend to go this far, but merely intended to embrace in its proposal underwriting and other financing relationships between the securities firm and the potential source of the non-public information. However, as a legal matter, it can make absolutely no difference whether the securities firm did or did not have such a relationship with the company whose securities were being recommended. Thus, the gravamen of plaintiffs' case is that defendant recommended a security which it should not have recommended based on the non-public information which it obtained from the issuer. Although, plaintiffs have alleged that the defendant acquired the non-public information through its investment banking department, it would have made no difference to the plaintiffs' case if the information were acquired through the defendant's research department.

B. *Moreover, the Commission's Proposal is Misguided Even if Limited to "Investment Banking Relationships."*

The Commission seems to equate an investment banking relationship with a specific commitment to underwrite a securities offering or other similar financing involvement. (Commission Br. at 12). It then suggests that a securities firm should not recommend securities of its investment banking clients. Such a suggestion is a *non sequitur*. If the function of an investment banker is to underwrite an offering of securities, it must necessarily recommend the securities being underwritten.

The Commission may be attempting, however, to suggest that the function of an investment banker is merely to recom-

mend the securities at the time it is engaged in an underwriting and that at other times it should abstain from recommending those securities. Such a limited concept of the investment banking relationship is inconsistent with an investment banker's obligations to both its investment banking clients and its securities customers.

An investment banker/securities broker, such as Paine, Webber, has continuing obligations to both its investment banking clients and the customers to whom it markets the securities of such clients. Both categories of obligations do not begin and end with the underwriting of a specific issue of securities. To the contrary, it is to the benefit of both the investment banking client and the securities customer that such firms also assume an obligation to serve as a "sponsor" in the trading market for issues they may have underwritten. This obligation is of vital importance to public brokerage customers who are dependent upon firms such as Paine, Webber for a continuing flow of investment advice, particularly concerning securities they have purchased on the recommendation of the firm.

Such sponsorship involves, among other things, a willingness and ability to provide sound recommendations and advice to the firm's customers concerning the security. Indeed, the sponsoring firm, having insured through due diligence investigation prior to each underwriting that all material information has been made public, is generally in the best position to offer such recommendations and advice. The Commission itself has heretofore acknowledged the significant role which sponsorship plays in the securities industry and in the trading markets. See Securities and Exchange Commission, 2 *Special Study of Securities Markets*, 585-86 (1963).

The investment banking function would be seriously impaired if an investment banker/securities broker could not make recommendations with respect to a security it has underwritten after completion of the distribution. The trading market as well as the customer would be the loser; in the vast bulk of cases

the firm's investment banking department would possess no inside information to contradict the advice and recommendations of the firm's broker-dealer department. The fact that a rare case might appear where the investment banking department would have such information does not justify the adoption of the Commission's sweeping suggestion that all securities of investment banking clients be placed on a "restricted list."

III

The Only Acceptable Solution to the Dilemma Which the Case at Bar Presents is for this Court to Answer the Certified Question in the Negative.

Paine, Webber is in full agreement with the Commission and Salomon that a securities firm should maintain a "Chinese wall" between its investment banking and broker-dealer departments. However, if the "Chinese wall" is rigorously maintained, then Paine, Webber, unlike Salomon and the Commission, concludes that a securities firm should not be held liable for recommendations reasonably made in light of available public information, even if that firm's investment banking department possesses material non-public information that contradicts the public information used by the broker-dealer department and upon which the recommendation is based.

Paine, Webber reaches this conclusion because there is no other alternative that would preserve the insider trading doctrine while avoiding a harshly adverse impact on the securities industry. Contrary to the Commission's suggestion, the only "restricted list" concept which deserves any serious attention is one which would involve placing a security on a restricted list where the firm has *actually obtained* inside information relating to securities that have been or might be recommended. There are, however, at least two distinct problems involved in any attempt to implement such a "restricted list" concept.

A. *Where Inside Information is Received Before Any Recommendation is Made Placing the Security on a "Restricted List" Would be an Impermissible Signal.*

If a securities firm receives inside information* with respect to a security, whether from an investment banking relationship, research or any other source, it could place that security on a "restricted list" to insure against recommendation. To serve its purpose, the "restricted list" would, of course, have to be circulated to the firm's registered representatives. However, Paine, Webber, which is not unrepresentative of large retail firms, has over 1,900 registered representatives in more than 100 offices spread across the country and overseas. As a practical matter, placing a security without explanation on a "restricted list" distributed to 1,900 registered representatives will be a "signal" that Paine, Webber possesses inside information with respect to such security. It is unrealistic to believe that such a signal can be camouflaged. Yet, if such a signal is not camouflaged the securities firm exposes itself to liability because the signal may be construed as an improper use of inside information.

B. *The Signal Will be Even Clearer Where Inside Information is Received After a Recommendation is Outstanding.*

An even more serious problem is presented when inside information is received after recommendations to buy have been made and are outstanding. If the firm does not withdraw its recommendation, then, like defendant-appellant in the case

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*As a practical matter, inside information is often received on a piecemeal basis as part of a "mosaic" of information. No one bit of information is dispositive, and, therefore, the materiality of the inside information that has been received may be only suggested over a course of time. For this reason, it could be extremely difficult for a securities firm to know when a particular security should be placed on a restricted list. See "Loomis on Inside Information," *Financial Analysts Journal*, May-June 1972 at 57-60.

at bar, it exposes itself to liability to those customers who purchase securities based upon the recommendation. If, on the other hand, the firm does withdraw its recommendation, then it opens itself to the charge that it has improperly "signaled" its possession of material inside information adverse to its recommendation. The Commission clearly recognizes this latter possibility when it states in its brief that

> "the firm's action in placing a security on a restricted list and in withdrawing an outstanding recommendation must be effected in a manner which avoids disclosure as to whether any material inside information possessed by the firm is in accord with or contrary to the recommendation." (Commission Br. at 11-12).

The Commission does not say how such disclosure can be provided. It simply assumes that it can readily be done. Such an assumption, however, is entirely unfounded. In Paine, Webber's experience, the mere act of withdrawing the recommendation will, as a practical matter, inevitably be taken by the customer as a signal that the firm has come into possession of inside information "contrary to the recommendation." (*Id.*). This, of course, will cause the customer to refrain from purchasing the security in question, which presumably would be in his best interest, but would be construed, under the present state of the law, as an impermissible "use" of inside information. It would constitute an open breach of the "Chinese wall," which the Commission has strongly endorsed as a solution to the dilemma posed by the issues before this Court.

Whether those receiving such a signal would infer the existence of favorable or unfavorable information would probably depend upon the context of the information publicly available. At the very least, the signal would set-off speculation and rumor. The effect of such rumor could well be to induce holders of the security to sell and speculators to sell short.

In short, the securities firm would be placed in the situation where there is absolutely nothing which it can do to avoid liability. Because of the requirement of the "Chinese wall," it cannot communicate the inside information, or even the fact of the inside information, to its broker-dealer department. It cannot legally tell its customer that he should not buy the security, despite the recommendation earlier given, because of inside information received in the interim. It cannot refuse to execute transactions in the security for the customer, because such refusal would constitute an impermissible signal. And it cannot withdraw its recommendation because to do so would also necessarily involve an impermissible signal. Paine, Webber respectfully suggests that any rule of law which is so contrived that it cannot be obeyed is inherently defective.

C. *Accordingly, this Court Should Affirm the Prohibition Against the Use of Inside Information by Answering the Certified Question in the Negative.*

If this Court answers the certified question in the affirmative, then Paine, Webber believes that it must make clear in its decision that a securities firm does not violate the law respecting the use of inside information by placing a security on a "restricted list" or withdrawing a recommendation when it comes into possession of inside information. Any other result would place the securities firm in the untenable position of violating one law (against signaling possession of inside information) in the very process of seeking compliance with another (against recommending securities with respect to which the firm possesses adverse inside information). This is the true predicament which a securities firm faces under the District Court's opinion, and not as that court suggests, that the firm is simply at a competitive advantage "vis-a-vis other broker-dealers who do not possess such information and hence are not disabled from soliciting purchasers." [1973-74] CCH Fed. Sec L. Rep. ¶94,329 at 95,132.

Alternatively, this Court can rule, and Paine, Webber believes that it should rule, that a firm does not violate the antifraud provisions of the federal securities laws if its broker-dealer department reasonably recommends a security based on public information (even though the firm's investment banking department possesses adverse inside information), so long as that firm has scrupulously adhered to the "Chinese wall" policy. Such a result would avoid the dangers of a substantial breach in the insider trading doctrine and a radical restructuring of the securities industry which many, including the Commission, legitimately fear. It would also serve to encourage the development of research capabilities within investment banking/securities brokerage firms. Firms would then be assured that they may exercise their obligations to customers without danger of unwarranted liabilities from unavoidable encounters with inside information.

Furthermore, such a result would do no injustice to customers who happen to be in the same situation as plaintiffs in the case at bar. Neither the District Court, nor the Commission, nor Salomon Brothers has suggested that such customers are entitled to receive inside information. If one of defendant's salesmen misled plaintiffs herein, it was because the law prohibited the disclosure of inside information to the firm's customers or even to its salesmen. Defendant should not be penalized, in short, for complying with the law against the misuse of inside information and giving the same advice based on the same information that plaintiffs would have received had they transacted business with any other firm.

CONCLUSION

For the foregoing reasons Paine, Webber respectfully urges that this Court answer the certified question in the negative.

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